

TESTIMONY OF CLARK KENT ERVIN, FORMER INSPECTOR GENERAL OF  
THE U.S. DEPT. OF HOMELAND SECURITY, BEFORE THE HOUSE  
SUBCOMMITTEE ON DOMESTIC AND INTERNATIONAL MONETARY POLICY,  
TRADE & TECHNOLOGY HEARING ON “FOREIGN INVESTMENT, JOBS, AND  
NATIONAL SECURITY: THE CFIUS PROCESS,” MARCH 2, 2006

Thank you for your invitation to testify today on an issue that I believe is of profound importance to the security of our homeland – whether a foreign government with a mixed record on terror should be allowed to operate terminals at six major American seaports, a vulnerable strategic asset through which, experts agree, a terrorist would be most likely to smuggle a weapon of mass destruction into our country. The stakes could not be higher. Needless to say, a terrorist attack with a weapon of mass destruction could exceed the impact of 9/11 by several factors, resulting potentially in the deaths of millions of Americans and bringing our economy to its knees.

In the weeks since the proposed acquisition by Dubai Ports World, a company owned by the government of the United Arab Emirates, of the American port terminal operations of British based, P & O, became widely known, we have learned a number of troubling things. I would wager that most Americans did not know until the controversy over this deal arose that port terminals in this country have been operated by foreign companies for quite some time. Likewise, most Americans did not know that a secretive interagency group, the Committee on Foreign Investment in the United States, has the unilateral power to approve the acquisition by foreign companies of key U.S. strategic commercial assets after a mere 30-day review, without being obliged so much as to notify the President or the Congress.

To make bad matters worse, in this instance, the acquiring entity is effectively a foreign nation, a nation that has recently been supportive of us in the war on terror, but a nation that also has a relatively recent history too closely tied to terrorism for comfort. The UAE was one of only three countries in the world that recognized the Taliban regime in Afghanistan that sheltered Osama bin Laden and provided his Al Qaeda network with a base of operations in the years prior to the September 11 attacks; two of the 9/11 hijackers were UAE nationals; much of the financing for the attacks coursed through the UAE banking system; and Pakistan nuclear scientist A.Q. Khan smuggled components to Libya, North Korea, and Iran through the UAE.

Where the acquirer of an asset with national security implications is a foreign power, the committee is required by law to follow its 30-day preliminary review with a 45-day “investigation.” After the investigation is completed, the decision as to whether the deal goes forward is not the committee’s to make. It must then make a recommendation to the President, who then has an additional 15 days to study the matter on his own and make his own decision. Thereafter, the President is to inform the Congress of what he has decided.

In this instance, the already unduly rushed and lax CFIUS procedures were not followed. Even though the control of key operations was at issue, there was no investigation, the committee made the decision to approve the deal on its own, and the President was not even informed of the decision.

At a minimum, as I argued in a New York Times opinion editorial last week, the CFIUS process must be changed. The review period is too short, and the committee has too much unilateral power. Where the control of a component of the nation's critical infrastructure or of a key strategic asset is concerned, and the acquirer is a foreign government, the law should be changed to require the committee to conduct a complete and lengthy (longer than 45 days) investigation to determine whether permitting the deal to go forward could compromise national security. The committee may make a recommendation to the President, but he should then make his own decision after his own review of the matter (for longer than 15 days). Then, rather than simplifying notifying Congress of his decision as a *fait accompli*, the President should have to seek and obtain Congressional approval for the deal to be finally approved. If treaties and trade agreements are important enough to require congressional sign-off as well as presidential approval, certainly congressional concurrence should be required before a foreign nation gains control of something as important as operating terminals at key seaports.

The foregoing goes to process. As to substance, this deal should not be approved under any circumstances, even if it had the support of both ends of Pennsylvania Avenue. In the post 9/11 age, we should have learned that there is no margin for error when it comes to the security of the homeland. Under these circumstances, now that we know that operations at many other key ports are controlled by foreign companies, perhaps consideration should be given to prohibiting such control in the future, even if the company at issue is one based in a rock solid ally like Great Britain. But, certainly, we should not hand over control of port operations to a nation that has strong links to terrorism.

In the last few weeks as this controversy has unfolded, I have listened carefully to the arguments of those who support this deal. Basically, they boil down to four, none of which stands up to scrutiny.

One argument is that it is nativist, xenophobic, and even racist to oppose this deal. In fact, opposition to this deal has nothing to do with UAE's being an Arab and Muslim country. If the acquirer here were the government of Japan or the government of Norway and either of those countries had the same record as the UAE on terror I, for one, and doubtless others as well, would oppose this deal just as strongly. It is UAE's record that is at issue here, not the ethnicity or religious affiliation of its people.

Another argument is that, if this deal goes forward, the new owners won't have anything to do with security. This is just flat out inaccurate and untrue. Yes, the Customs bureau of the U.S. Department of Homeland Security would continue to be responsible for inspecting cargo containers coming into these ports, and yes, the Coast Guard would

remain “in charge” of security at these ports. But, of the tens of thousands of cargo containers that enter our ports each year, only about 6% are physically inspected to determine definitively whether they contain weapons of mass destruction or other threat items. And, the Coast Guard’s being in charge of port security simply means that it promulgates security standards and reviews ports’ security plans to determine whether, on paper, those plans conform to the standards. The actual day-to-day, on-the-ground implementation of those standards and plans is left up to the terminal operators. It is they who perform critical security tasks like vetting, hiring, and supervising security guards; securing the terminal area, guarding the cargo; and overseeing the cargo unloading process. Furthermore, the terminal operator is, of course, privy to key intelligence like ports’ various security vulnerabilities, and those Customs and Coast Guard port security plans and procedures to address these vulnerabilities, information that would be invaluable to a terrorist bent on murder and mayhem.

A third argument is that UAE is, at least now, a key ally in the war on terror, and turning down this deal would alienate them and others in the Middle East whose support is essential if we are to prevail against our enemies. UAE may well be a key ally, but that is no reason to turn over the control of a key strategic asset to them. Port terminals are not carrots that should be handed out as rewards for other nations’ cooperation. If, indeed, our approval of such a deal is a quid pro quo for UAE’s continued support, the price is too high and we should not pay it.

The final argument is, to my mind, the most dangerous. It would be ludicrous if it were not so disturbing. According to some, our ports are already vulnerable because too little money has been spent to secure them, too few cargo inspections are conducted, we have too little radiation detection equipment, and the equipment we have is not all that good. This is all true, but instead of agreeing to something that might make our already vulnerable ports even more vulnerable shouldn’t we address the vulnerabilities we already have?

This brings me to my final point. No one, and I do mean no one, has argued that agreeing to this deal will make our ports safer. At most, those on the other side say that it won’t make us any less safe than we presently are. Is this the standard we are setting for ourselves now, five years after 9/11? For my part, in the post 9/11 world, we should do only that which inarguably enhances homeland security. This deal, manifestly, does not pass this commonsense test.

Clark Kent Ervin  
Former Inspector General  
U.S. Department of Homeland Security